Twin County Trucking, Inc. *and* Local 478, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America *and* Local 1964, International Longshoremen's Association, AFL-CIO. Cases 22-CA-9984, 22-CA-10185, and 22-RC-8201

December 8, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On May 19, 1981, Administrative Law Judge Walter H. Maloney, Jr., issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in response to Respondent's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs[1] and has decided to affirm the rulings, findings,[2] and conclusions[3] of the Administrative Law Judge.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Twin County Trucking, Inc., Neptune and Tinton Falls, New Jersey, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Coercively interrogating employees concerning their union activities and the union activities of other employees.

(b) Threatening to castrate employees because they have engaged in union activities.

(c) Offering promotions, wage increases, and other benefits to employees in order to defeat a union organizing drive.

(d) Telling employees that their union activities are acts of futility.

(e) Telling striking employees that they would never be hired again.

(f) Urging employees to select as their bargaining agent a labor organization other than the one they have selected and telling them that the only union which the Company would recognize is one which met company approval.

(g) Threatening to discharge employees, close the plant, or merge the business with another company if employees selected a union as their bargaining agent.

[1] In its post-hearing brief, Respondent alleges that the Administrative Law Judge exhibited bias and prejudice against it, and on this ground moved for a rehearing of this case before a different administrative law judge. Respondent contests the Administrative Law Judge's credibility resolutions, contending that he uniformly credited the testimony of the General Counsel's witnesses and discredited the testimony of its witnesses. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings. Nor do we find merit in Respondent's contention that, because the Administrative Law Judge generally discredited Respondent's witnesses and credited the General Counsel's witnesses, his credibility resolutions are erroneous or attended by bias or prejudice. *N.L.R.B.* v. *Pittsburgh Steamship Company*, 337 U.S. 656 (1949). Respondent further alleges that the Administrative Law Judge demonstrated bias when in an off-the-record discussion at the hearing, prior to Respondent's presentation of its evidence, the Administrative Law Judge expressed his opinion as to the ultimate merits of the case. However, Respondent did not object on the record to the alleged discussion, and did not comply with our procedures for requesting disqualification of an administrative law judge. Sec. 102.37, Rules and Regulations of the National Labor Relations Board, Series 8, as amended. See *Sanford Home for Adults*, 253 NLRB 1132, fn. 1 (1981). Respondent's motion is denied accordingly.

Respondent further moves to reopen the hearing to admit additional exhibits. Respondent seeks to introduce an affidavit of Respondent's owner, Joseph Lee, and letters written by Respondent's attorney, which Respondent claims demonstrate that Respondent agreed to reinstate the unfair labor practice strikers. However, these proposed exhibits all postdate the hearing and are relevant only as to the amount of backpay due the discriminatees. Since this issue is to be decided at the compliance stage of these proceedings, we hereby deny this motion.

Additionally, Respondent moves to strike the Administrative Law Judge's finding that Respondent violated Sec. 8(a)(3) of the Act. Respondent contends that the General Counsel has withdrawn these charges and therefore the Administrative Law Judge lacked jurisdiction to make these findings. However, the record indicates that the 8(a)(3) violations found by the Administrative Law Judge were charged in Case 22-CA-10185, and these charges were never withdrawn. Only certain charges in Case 22-CA-9984 have been withdrawn by the General Counsel. Therefore, this motion is also denied.

[2] In the second paragraph of the portion of his Decision entitled "The Unfair Labor Practices Alleged," the Administrative Law Judge stated that, by April 1, 1980, union adherents had collected 21 signed authorization cards. In fact, as noted in fn. 7 of his Decision, the Union had collected 22 signed cards by this time. We hereby correct this inadvertent error.

[3] The Administrative Law Judge dated the bargaining order April 1, 1980, based on his finding that Respondent's unlawful conduct began on or about that date and the Union had attained signed authorization cards from a majority of Respondent's employees by then. The record indicates, however, that Respondent had collected 21 authorization cards, a majority of the 40-employee unit, by March 31, and had previously demanded recognition. Accordingly, we find that Respondent's obligation to bargain with the Union dates from March 31, 1980. See *Hasbro Industries, Inc.*, 254 NLRB 587 (1981); *Cas Walker's Cash Stores, Inc.*, 249 NLRB 316, fn. 3 (1980), and cases cited therein; *Frederick's Foodland, Inc., d/b/a Bucyrus Foodland North and Bucyrus Foodland South*, 247 NLRB 284 (1980).

The Administrative Law Judge found that Joseph Lee's April 8, 1980, agreement with Union Business Agent John Senick to schedule a negotiation session for the next week constituted *de facto* recognition of the Union. This finding is unnecessary in light of the fact that Respondent's bargaining obligation commenced on March 31, 1980.

We have substituted the Order below in lieu of the Order provided by the Administrative Law Judge in order to correct certain inadvertent errors and to conform to the remedy recommended by the Administrative Law Judge. Member Zimmerman finds no practical difference in this case between a bargaining order dated March 31 and one dated April 1.

(h) Granting employees wage increases in order to defeat a union organizing drive and unilaterally establishing wage increases and changes in working conditions without first bargaining in good faith with the unit bargaining agent concerning such changes; provided that nothing herein shall be construed to require the Respondent to rescind any increase in wages or benefits which it has heretofore granted.

(i) Refusing to reinstate unfair labor practice strikers upon their unconditional request for reinstatement.

(j) Discouraging membership in or activities on behalf of Local 478, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, or any labor organization, by discharging employees, either before or after they have gone on strike, or otherwise discriminating against them in their hire or tenure.

(k) Refusing to recognize and bargain collectively with the aforementioned labor organization as the exclusive collective-bargaining representative of all of Respondent's full-time and regular part-time truck drivers, platform workers and mechanics employed at the Respondent's Neptune and Tinton Falls, New Jersey, terminals, exclusive of office clerical employees, managerial employees, professional employees, guards, and supervisors as defined in the Act.

(l) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the purposes and policies of the Act:

(a) Upon request, bargain with Local 478, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, as the exclusive collective-bargaining representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All full-time and regular part-time truck drivers, platform workers, and mechanics employed at Respondent's Neptune and Tinton Falls, New Jersey, facilities, exclusive of all office clerical employees, managerial employees, professional employees, guards, and supervisors as defined in the Act.

(b) Offer Darren Brown, Kevin Brown, Anthony Coffero, Steven Cole, Daniel Florio, Joseph Fontana, Frank Harrington, Thomas Henville, John Hewlitt, Joseph Hildebrandt, Stafford Hoffman, James La Pointe, Ray La Pointe, and Brian O'Connor full and immediate reinstatement to their former positions of employment, or, if those jobs no longer exist, to substantially equivalent positions of employment, without prejudice to their seniority or other rights and privileges they previously enjoyed, and make them whole for any loss of pay or benefits which they have suffered by reason of the discrimination found herein, with interest, in the manner described in the section of the Administrative Law Judge's Decision entitled "Remedy."[4]

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at Respondent's places of business at Neptune and Tinton Falls, New Jersey, copies of the attached notice marked "Appendix."[5] Copies of said notice, on forms provided by the Regional Director for Region 22, after being duly signed by Respondent's representative, shall be posted immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 22, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that Case 22-RC-8201 be, and it hereby is, severed from Cases 22-CA-10185 and 22-CA-9984; that the election conducted therein be, and it hereby is, set aside; and that the petition therein be, and it hereby is, dismissed.

[4] Member Jenkins would compute interest on backpay in the manner set forth in his partial dissenting opinion in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

[5] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions,

the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT coercively interrogate employees concerning their union activities and the union activities of other employees.

WE WILL NOT threaten to castrate employees because they have engaged in union activities.

WE WILL NOT offer our employees promotions, wage increases, or other benefits in order to defeat a union organizing drive.

WE WILL NOT tell employees that their union activities are acts of futility.

WE WILL NOT threaten to discharge employees, to close the plant, or to merge the business with another company if employees select a union as their bargaining agent.

WE WILL NOT tell striking employees that they will never be hired again.

WE WILL NOT urge employees to select as their bargaining agent a labor organization other than the one they have selected and tell them that only a union having company approval will be recognized.

WE WILL NOT grant employees a wage increase in order to defeat a union organizing drive.

WE WILL NOT discharge employees, whether or not they are on strike, or otherwise discriminate against them in their hire or tenure, in order to discourage their support of and activities on behalf of Local 478, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, or any other labor organization.

WE WILL NOT unilaterally grant wage increases or make changes in working conditions without first bargaining in good faith with Local 478, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, as the exclusive collective-bargaining representative of the employees in the bargaining unit described below.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed to them by Section 7 of the National Labor Relations Act.

WE WILL recognize and, upon request, bargain collectively in good faith with Local 478, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, as the exclusive collective-bargaining representative of all employees in the bargaining unit described below with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All full-time and regular part-time truckdrivers, platform workers, and mechanics employed at our Neptune and Tinton Falls, New Jersey, facilities, exclusive of office clerical employees, managerial employees, professional employees, guards, and supervisors as defined in the Act.

WE WILL offer full and immediate reinstatement to Darren Brown, Kevin Brown, Anthony Coffero, Steven Cole, Daniel Florio, Joseph Fontana, Frank Harrington, Thomas Henville, John Hewlitt, Joseph Hildebrandt, Stafford Hoffman, James La Pointe, Ray La Pointe, and Brian O'Connor, and WE WILL make them whole for any loss of earnings they may have suffered by reason of the discrimination practiced against them, with interest.

TWIN COUNTY TRUCKING, INC.

DECISION

FINDINGS OF FACT

STATEMENT OF THE CASE

WALTER H. MALONEY, JR., Administrative Law Judge: This case came on for hearing before me in Newark, New Jersey, on a consolidated unfair labor practice complaint,[1] issued by the Regional Director for

[1] The principal docket entries in this case are as follows:

Charge filed by Local 478, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America (herein called Union or Teamsters) in Case 22-CA-9984 against Respondent on May 19, 1980; original consolidated complaint issued on July 30, 1980; Respondent's answer to original complaint filed on August 8, 1980; charged filed by the Union against Respondent in Case 22-CA-10185 on July 29, 1980; first amended consolidated complaint issued on October 2, 1980; amended answer filed on February 18, 1981; hearing held in Newark, New Jersey, on March 11, 12, and 13, 1981; and briefs filed with me by the General Counsel and Respondent on or before April 27, 1981.

The principal docket entries in Case 22-RC-8201 are as follows:

Representation petition seeking an election in a unit of all full-time and regular part-time drivers, platform workers, warehousemen, mechanics,

Continued

Region 22 of the National Labor Relations Board and amended at the hearing, which alleges that Respondent Twin County Trucking, Inc.,[2] violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act, as amended, herein called the Act. More specifically, the amended complaint alleges that Respondent offered wage increases to employees to dissuade them from supporting the Union, told employees that their selection of the Teamsters as a bargaining agent was an act of futility, threatened to discharge employees and to close the plant if the Teamsters became the bargaining agent, coercively interrogated employees concerning their union sympathies and activities, discharged Daniel Florio because of his union activities, and failed and refused to reinstate 14 named strikers upon their unconditional application. The General Counsel seeks a so-called *Gissel*[3] bargaining order and a bargaining order restraining Respondent from refusing to bargain by unilaterally changing the wages and other terms and conditions of employment of its dock workers without first bargaining about these issues with the Teamsters. Respondent denies these allegations. It asserts that the Teamsters is not the majority representative of their employees and it has no obligation to recognize and bargain with the Teamsters. The Charging Party contends that the Board should sustain the objections it filed to the election conducted at Respondent's terminal on May 8, 1980, because of the unfair labor practices noted in those objections and other unfair labor practices alleged in the amended complaint. Upon these contentions, the issues herein were joined.[4]

I. THE UNFAIR LABOR PRACTICES ALLEGED

Respondent is a trucking company which is owned and operated by Joe Lee.[5] It maintained a terminal at Neptune, New Jersey, and now operates principally at Tinton Falls, New Jersey. Respondent makes what are essentially local deliveries although its trucks regularly operate in States other than New Jersey. In the spring of 1980, when the events in this case took place, Respondent employed 40 drivers, mechanics, dockworkers, and helpers, all of whom were unrepresented by any labor organization. Most of its warehousemen (referred to in the record as dock workers or platform workers) worked between the hours of 5 p.m. and midnight (or later). It was within the ranks of this group that the Teamsters organizing effort had its inception.

In early March 1980, in response to various complaints that had been discussed among the platform crew, dockworker Anthony Coffero contacted Teamsters Local 584 in Union, New Jersey, and told the Union that Respondent's employees were interested in joining. Coffero spoke by phone with Business Agent John Senick, obtained designation cards[6] from Senick by mail, and began passing them out to other employees at the terminal. By April 1, 1980, Coffero and his associates had collected signed cards from 21 dockworkers, mechanics, and drivers.[7] The parties agree that, on that date, Respondent employed some 40 individuals in this unit.[8] Accordingly, as of April 1, the Charging Party represented a majority of unit employees.[9]

On March 28, Senick sent a letter to Respondent in which he stated that Teamsters Local 478 had been designated as the bargaining agent for its drivers and platform men and that he would like to set up a meeting with company representatives for the purpose of negotiating a contract. On Monday, March 31, Senick received a phone call from Fred Grill, Respondent's terminal manager, who informed Senick that he would like to have a meeting the following week. Senick said he would be available, so Grill told him he would call again to establish a firm date. Later that day, Grill phoned the Union's office and left word that he would not meet with Senick upon advice of his lawyer.

On April 1, Senick spoke by phone with Thomas F. X. Foley, Respondent's attorney. There is a dispute as to

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dispatchers, and helpers, with the usual exclusions, filed by Local 1964, International Longshoremen's Association, AFL-CIO (herein called ILA), on April 14, 1980; Stipulation for Certification Upon Consent Election agreement approved by the Regional Director for Region 22, on April 24, 1980; election held on May 8, 1980; objections to the conduct of the election filed by Teamsters on May 15, 1980; Report on Objections and Challenges issued on July 23, 1980.

[2] Respondent admits, and I find, that it is a New Jersey corporation which operates a warehouse and interstate trucking business in Tinton Falls and Neptune, New Jersey. During the preceding year, it performed trucking services from points and places inside the State of New Jersey to points and places outside the State of New Jersey valued in excess of $50,000. Accordingly, it is an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act. Both the Teamsters and ILA are labor organizations within the meaning of Sec. 2(5) of the Act.

[3] *N.L.R.B.* v. *Gissel Packing Co., Inc.*, 395 U.S. 575 (1969).

[4] Certain errors in the transcript have been hereby noted and corrected.

[5] While his name figured prominently in these proceedings, Joe Lee neither testified nor appeared during the course of the 3-day hearing in this case. His absence was unexplained. In accordance with well-settled rules of evidence, I will assume that, had Joe Lee testified, his testimony would support the General Counsel's case.

[6] The union cards used in this campaign were conventional authorization cards which stated on their face:

> I, the undersigned, hereby apply for admission to membership in the above Local Union and voluntarily choose and designate it as my representative for purposes of collective bargaining, hereby revoking any contrary designation. . . .

The cards also contained other undertakings and provided spaces for the insertion of the date, the name, and other information pertaining to the applicant, and the applicant's signature.

[7] Respondent acknowledged the validity of cards signed by employees Kevin Brown, Fred Brown, Anthony Coffero, Daniel Florio, Joseph Fontana, Frank Harrington, Thomas Henville, John Hewlett, Joseph Hildebrandt, James LaPointe, Raymond LaPointe, Bryan O'Connor, and Donald Randall, and agreed that their cards should be admitted into evidence by stipulation. The General Counsel established through eyewitness testimony that signed cards had been presented to Coffero on or before April 1, 1980, by Eugene Bennett, Darren, Brown, Stephen Cole, Stafford Hoffman, Walter Hughes, Roger Neil, David Summers, Gerald Wardell, and Dennis Winslow. A 23d card, signed by William Dunnkosky, was admitted into evidence. However, Dunnkosky did not begin to work for Respondent until after the strike began and signed his card on April 9.

[8] In addition to the 22 employees whose names are recited in fn. 7 as having signed cards on or before April 1, Respondent also employed the following 18 bargaining unit employees on that date: Douglas Bass, Richard Boucher, George Conklin, John Dangler, Gary Daniel, Robert Harris, Julius Helmlinger, Donald Huey, James Jenkins, John Kelly, John Lowe, John La Belle, Thomas La Belle, Thomas Przybylinski, Donald Sullivan, Daniel Thorpe, Dennis Vitello, and Richard Warth.

[9] Respondent contends that a claim of majority status should be measured against a unit which had six additional employees—Bruce Burns, Gordon Dreher, Brian Gioia, Raymond Meyers, William Maximo, and Alex Mamusis. However, none of these employees was hired until at least April 7, and some were hired after that date.

some of the contents of this conversation and particularly concerning whether or not Senick offered to exhibit the cards then in his possession to a neutral third party for purposes of a card check. There is no doubt that, in the course of this phone conversation, Senick again demanded recognition. At Foley's request, Senick wrote Respondent a second letter, dated April 2, in which he stated that he had in his possession authorization cards signed by a majority of Respondent's drivers and platform men. He again asked that Respondent contact him immediately for the purpose of commencing negotiations.

Shortly thereafter, a sign was posted on the dock notifying dockworkers and drivers that a meeting with Joe Lee would be held on the following Friday morning, April 4. Friday was a holiday and attendance at the meeting necessitated a special trip to the terminal by employees who attended. During the week preceding the meeting, several supervisors had occasion to speak with dockworkers concerning the Teamsters organizing drive. In a conversation at the dock with employee Tony Coffero and several others, Grill stated that there could be trouble at the Company because of the Union drive. He went on to say that, knowing Joe Lee as he did, if the Teamsters came in, Lee would just lock the doors. He also informed employees that, to be eligible to vote in a representation election, an employee had to be at least 18 years of age with 1,000 hours of company service. On another occasion during the same week, dock worker John Kelly asked Grill if Grill knew who brought the Union into the terminal. Grill replied that he was going to get some of his buddies to find out and then "cut his — off."

Night Foreman David Russell informed several of the dockworkers that they did not have to attend the Friday morning meeting. He said that Joe Lee was going to discuss the pros and cons of Local 478 but only those eligible to vote in a representational election could attend. He repeated Grill's statement that only those over 18 years of age with 1,000 hours of company service could vote. Coffero told Russell that he would like to see those eligibility requirements in writing and asked him what was going to happen at the meeting. Russell replied that it was going to come down to the fact that, if the Teamsters got in, Joe Lee would lock the doors and all the employees would be out of work. When asked how Lee could carry this off, Russell replied that Lee could close down and reopen 30 days later under another name. He also suggested that Lee had the option of merging his Company with another company named Castways.

A few days before the meeting, Grill and Russell had occasion to speak privately at the warehouse with dockworker Joseph Hildebrandt. On that occasion, they told Hildebrandt that they were going to restructure the warehouse, keeping five full-time employees and 2 part-time employees in addition to Hildebrandt. At that time, there were two part-time employees and 12–15 others who worked about 35 or more hours a week in the warehouse. They offered Hildebrandt a job as foreman, at an increase of $6.25 (as compared with his current rate of $4 per hour), and told him that he would get an extra 75 cents per hour across the board on Labor Day. They mentioned the names of the dockworkers who would be retained on the payroll as full-time employees. They also asserted that they did not know who had started the unionization effort but whoever did it would be fired and not rehired.

During the conversation, Grill told Hildebrandt that he suspected that Danny Florio had started the union drive. Hildebrandt refused to comment. He told Grill and Russell that he appreciated the confidence that was implied in their offer of a promotion and a raise but informed them that, if the purpose of the meeting were simply to pump him about who started the union drive or to inquire into the specifics of the drive, the conversation was at an end because he would not divulge any such information. Grill told Hildebrandt that he did not care who signed union cards and then reversed his position by asking Hildebrandt if in fact he had signed a card. Hildebrandt replied that he had signed a card and that everyone else had also signed cards.

Throughout the week of March 31–April 4, Russell told employees that unionization was useless, that Joe Lee would never stand for the Teamsters, and that he would go to any length to stop them. On one occasion, just after the dockworkers had punched out for the night, he told them that Lee would simply close the doors, that Lee would not pay the Teamsters wage scale, and that the employees would be out of a job.

During this same period of time, Russell asked dockworker Frank Harrington who started the union effort. Harrington refused to say. He also asked Harrington if he would attend the Friday meeting. Harrington replied that he was committed to Local 478 and that he would not attend. Russell told Harrington that the Company was going to implement a plan for the warehouse which provided for six full-time employees, including a foreman, and two part-timers. He indicated that Harrington was among those who would be retained, that the new wage rate would be $6 per hour, and that Hildebrandt would receive $6.75. Russell also said that Joe Lee was going to have a medical and health plan, paid holidays, and a regular evening lunch period. He then named the other employees who would be retained. When Harrington asked if Coffero would be one of them, Russell said, "No." Russell said again that only those who had 1,000 hours of company time and were over the age of 18 would be eligible to vote on the question of unionization. Harrington responded that this rule would eliminate everyone who joined except Dallas Hoffman and Steve Colley. Russell's only comment was, "That's the law."

As advertised, Lee held a meeting of certain employees on the morning of April 4 in his office at the warehouse. Most truckdrivers attended but Hildebrandt was the only dock worker who showed up. Lee gave the assembled employees an account of what he paid out, stating that his books were open for inspection if anyone desired to see them. He went on to say that, if the Teamsters came in, he would have to pay specified benefits and there was no way he could do so. Lee told his employees that he had other business ventures and could survive without the trucking company. I credit testimony to the effect that Lee threatened on this occasion to close the terminal if the Teamsters came in. He said he

had other alternatives, such as merging with Castways, but affirmed that neither Teamster Local 478 nor Local 701 would represent employees in his Company.

Turning to Hildebrandt, Lee said that he was appalled at the treatment that the dockworkers had been getting. He admitted that he had overlooked them but asserted that he was going to make it up to them. He said he had been checking around, and specifically with Hoffman Trucking Company, and had learned that ILA-represented dockworkers at Hoffman's were making $5.25 per hour. He said he was going to make certain dock workers full-time employees and increased their pay to $6 an hour in order to make up for the neglect which they had suffered.[10]

Coffero had a meeting with Senick later on in the day and told Senick what he had heard about the meeting in Lee's office. Coffero had not attended that meeting. He made particular reference to Lee's plan to reduce the number of dockworkers. Senick told Coffero that, if the Company did not put all the men to work on Monday, Coffero should call a strike.

Dockworkers were next scheduled to report for work at 5 p.m. on Monday, April 7. One dockworker, Daniel Florio, had been absent from work the preceding Wednesday and Thursday. When he arrived at the terminal on April 7, Grill asked him why he had been off work. He explained that he had been absent in order to take a government examination as a third-class marine radio operator. Grill also asked him if he had heard anything about the Union. Florio said that he had heard something. Grill replied that he did not care who started the Union as long as the men did not go through with it, because Joe Lee would shut the plant down before letting a union come in. He then told Florio to go and speak with Russell in the office.

When Florio spoke to Russell, Russell told him that he would have to let him go because he had been absent. Florio objected, stating that he had received permission to be off on Wednesday and on Thursday if necessary. Russell retorted that Florio had only asked him for 1 day's leave. Florio explained that he had needed 2 days off—one to study for the examination and the other to take the test, but his explanation was to no avail.

Florio reported his discharge to other dockworkers as they were arriving for work. Another employee, Fred Brown, had also been terminated. When the dockworkers arrived, Grill and Russell held a brief meeting for the purpose of filling them in on changes which the Company was going to make at the terminal. Grill told these workers what had occurred at the Friday meeting which Joe Lee held. The employees were also told that Lee had stated his feeling that dockworkers had been neglected and that he had apologized for the neglect. Grill reported that Lee had been checking other terminals and hoped that the men could sit down and come to a compromise concerning a possible pay increase at the Twin City warehouse. Grill reported that Lee had said at the Friday meeting that he could not absorb the scale in the Teamsters General Freight Agreement and added his own comment to the effect that, the way the men were going then, everyone would be out of work. Grill did say that Lee would be comfortable with the union at Hoffman Trucking Company.

Hildebrandt, Harrington, and Coffero replied. They said that the choice of a union belonged to the employees, not to the Company. Grill and Russell were then asked why Florio and Fred Brown had been fired. Grill stated that Brown had been fired at the request of their insurance company because he did not have a driver's license and was involved in an accident while jockeying trucks around in the terminal yard. He said that Florio had been fired for missing work too often and for being absent without calling in.

Grill announced the Company's plan to employ only five full-time dock workers and two part-timers. He told the employees that, if they did not follow the plan, Joe Lee would turn the key in the door and either sell the Company or merge with Castways. In any event, he would not let Local 478 come in. Various employees objected, saying that this would leave 10 or 12 men out of work. At this point in the meeting, Hildebrandt gave Grill an argument. He said that the new arrangement was fine with him personally since it meant he was getting a raise but questioned Grill as to its effect on other employees who would be out of work. Grill suggested that the men sit down and talk with Joe Lee, asserting that Joe Lee wanted either a company union or a union from the outside that he could live with. Hildebrandt replied that the men wanted the Teamsters but that they would be amenable to negotiating with Lee, stating "We don't want to shoot the works right off. We want to reason with Lee and don't want to kill him with a wage rate he can't pay." Grill replied, "That's not going to happen. There will be five full time [men and] two part-time."

Coffero and others told Grill that the men could not handle that proposal because it would mean being without a job until an opening occurred. Grill's response was, "You do what you have to do and we will do what we have to do." The dockworkers held a brief meeting among themselves and decided to walk out.

On the same evening, they established a picket line in front of the terminal, using homemade signs which read, "Twin County Trucking Company on Strike, Local 478." I credit corroborated testimony in the record that, in the course of that evening, Grill came out to the picket line, told the pickets that he had checked with Joe Lee, and informed them that they were all fired.

Early Tuesday morning, Lee had occasion to speak with Coffero and striking employee Joseph Fontana in the Company's parking lot. Lee asked Coffero why he had not attended the meeting on Friday. Coffero replied that he did not want to hear about any union that Lee might propose. Lee apologized to Coffero and Fontana for the treatment which had been accorded to dockworkers in the past. He made reference to their wage rate and working conditions,[11] including the fact that

[10] At that time, dock workers were earning between $3.50 and $4 per hour.

[11] One of the major complaints which dockworkers had previously brought to Grill's attention was harsh treatment given them by Night Supervisor Russell. Russell is no longer with the Company

dockworkers received no regular break during the course of the evening to eat dinner. He said that he was going to make it up to the men, adding that, if Coffero had come to the meeting, he would have seen for himself that Lee was trying to be fair. He said that he had checked around and found that dockworkers in the area were being paid between $5.25 and $5.75 per hour. He stated that, if he could afford $6.25 an hour, he would pay it, and asked Coffero and Fontana to think about going back to work for $6 an hour.[12] Lee told them that the Teamsters were a bunch of gangsters and hardnoses and that he could not deal with them or live with them. He mentioned the ILA and said there was a possibility of having just a warehouse unit apart from the drivers. Coffero replied that this plan would provide no security, arguing that, if the men got rid of Local 478, they had no job security and Lee could then get rid of the them.

Lee then asked Coffero to call off the strike. Coffero said that he could not do so and told Lee he would have to speak with Senick. Lee then asked Coffero to arrange a meeting with Senick and Coffero did so. A meeting took place at 11 that morning in Lee's office. The upshot of the meeting was that Lee agreed to reinstate Florio and Brown and to pay the men for Monday night. The dockworkers then returned to work Tuesday evening. Senick and Lee also discussed, in general, the terms of the Teamsters standard area agreement. Lee told Senick that he was just starting in business and could not afford the Teamsters wage scale or the Teamsters health and welfare contributions.

I credit testimony in the record to the effect that, in the course of this discussion, Senick told Lee he held authorization cards signed by a majority of the employees in the unit. When Lee questioned this statement, Senick offered to exhibit them to a clergyman for purposes of a card check. He told Lee he did not want to let Lee see the cards personally for fear of company reprisal against card signers. He also asked Lee to bargain with him and Lee agreed to sit down and negotiate. However, Lee told Senick that he wanted to contact his attorney first because he felt that he was personally a poor negotiator. He informed Senick that he would set up an appointment the following week. Senick reported the results of this meeting to the picketing employees. They ceased picketing and returned to work at or before their regular starting time of 5 p.m.

On Tuesday evening, four or five employees were sent home about 8 p.m. One of these was Bryan O'Connor, who carpooled with Coffero and who had to walk home, a distance of about 5 or 6 miles, because Coffero continued working. Coffero objected to Russell about sending men home, claiming it was a breach of the agreement which had been concluded in Lee's office earlier in the day. Russell just laughed. Coffero also brought to Russell's attention the fact that O'Connor would have to walk 6 miles in order to get home. Russell was equally indifferent to this complaint.

On the following morning, April 9, Coffero called Senick and told him what had happened the previous evening. Senick instructed Coffero to call another strike if all of the men did not work on Wednesday evening, adding that he thought the Company was trying to wear the men down gradually and break the Union. At starting time on Wednesday the platform crew began to work as usual. However, about 8 p.m. Russell came to Coffero, asked him not to get upset, but informed him that he was sending men home at that time as he had the previous evening. He told Coffero that the Company was gradually working its way into a system which required five full-time dockworkers and two part-timers. Coffero's response was, "It looks like you are trying to start more trouble." Russell's only comment was, "You do what you have to do and I'll do what I have to do." Coffero held a brief meeting with the dockworkers, after which all of them walked out and reestablished their picket line. This picket line lasted until May 8, when a representation election was conducted at Respondent's terminal. Among those going on at this time were the 14 employees whose names appear in paragraph 25 of the first amended complaint.

I credit corroborated testimony in the record that, shortly after the dockworkers went out on strike for the second time, Grill came out to the picket line and told the pickets again that they were all fired for walking off the job for no reason. A few days after the picketing began anew, Grill went through the picket line and spoke to several pickets in passing. He told them that he was sorry about what had happened and stated that it was a shame the Company and the men could not come to some kind of agreement. However, he warned the pickets that, if the Teamsters came into the plant, Joe Lee would simply close the doors and everyone, including himself, would be out of a job.

On another occasion, Grill spoke with Hildebrandt at the picket line. He said that the men were foolish for going on strike, that they were not going to get anywhere, and that the Teamsters were just a bunch of gangsters who wanted their money. He asked Hildebrandt why he had signed a card and why the dockworkers "were doing something like this." Hildebrandt replied that the men had been receiving ridiculous treatment on the dock and just could not get any relief. Grill insisted that they should have come to him and "we could have worked out something more equitable," adding that the men were just "screwing" themselves because Joe Lee could close the doors. He told Hildebrandt that he could find a job anywhere because he had been in trucking a long time, but the strikers would be out of jobs and so would a lot of employees who were still working.

On April 10, Lee spoke to Harrington near the picket line while Harrington was reading the paper in his car. Lee told Harrington that it was too bad that the trouble had started. He said he had been meaning to put into effect a plan which would pay the dockworkers more money and improve their conditions but he had been occupied in consolidating new business for the Company. He went on to say that it was also too bad that the men went for Teamsters Local 478 because they were a bunch of gangsters. Lee insisted that Local 478 would never be allowed in his Company, insisting that if a

[12] At that time both men were making $3.50 an hour.

union were allowed to come in, it would be a union he approved of. He made specific reference to a "Hoffman Company union." Harrington asked Lee what he meant by a "Hoffman union." Lee replied that it was ILA Local 1964. He explained that Local 1964 was in at the Hoffman Company and that he had some familiarity with it. Harrington replied that the "president of the company doesn't pick the union; the men pick the union." Lee then told Harrington that, if Local 478 got in, he would merge the Company with Castways Freight and turn the key in the door, because Local 478 would never represent the men in his Company.

Harrington had another casual conversation with Lee at the picket line. On one occasion, Harrington told him that "we'll be back in there legally, moving freight for your company." Lee retorted, "Never. You will never work for me again." During the course of another conversation, Lee came out with a trade publication in the trucking industry and informed Harrington of a help wanted ad appearing in the paper for a truck salesman. (Harrington had previously been a truck salesman.) Harrington told Lee that he was not interested because the truck business was "shot" and because he liked the physical work involved in the freight business. He also said he needed a job and intended to stay in the freight business.

On April 14, ILA Local 1964 filed a representation petition seeking an election in the unit for which the Teamsters had made a demand. On April 23, a representation case conference was held at the Board's office in Newark, attended by representatives of Respondent, Local 1964, and Teamsters Local 478, which had intervened. A stipulation for certification upon consent agreement was signed and an election was scheduled for May 8. The Teamsters was represented at the representation case by its attorney, John A. Craner. In the course of the discussions which took place at the conference, Craner told Lee and his attorney, Thomas F. X. Foley, that he was offering to return all strikers to work immediately and unconditionally. Either Lee or Foley replied that they could return only when and if there were openings and informed Craner that there were no current openings.

Several striking employees attended the conference. Upon their return to the terminal at Neptune, they spoke with Grill. Hildebrandt told Grill about the conversation between Craner and Lee at the conference concerning the reinstatement of strikers. Grill said that he would have to see if any openings developed. Although vacancies have occurred from time to time at the terminal since that date, none of the individuals named in the first amended complaint have been reinstated.

At a representation election held on May 8, the tally of ballots revealed that ILA Local 1964 received 19 votes, Teamsters Local 478 received 17 votes, and 10 votes were challenged. The Report on Objections and Challenges recommended that three challenges be sustained, that two be overruled, and that the other five be held in abeyance, pending a determination as to whether the challenged voters were replacements for economic strikers or for unfair labor practice strikers.

II. ANALYSIS AND CONCLUSIONS

A. *Independent Violations of Section 8(a)(1) of the Act*

(a) Grill's statement to several dockworkers during the week of March 31–April 4, to the effect that there could be trouble at the Company because of the Union's drive and that if the Teamsters came in Joe Lee would just lock the doors, is a clear and emphatic threat which violates Section 8(a)(1) of the Act.

(b) During this same period of time, Grill stated to employee John Kelly that he did not know who started the Union but that he was going to get his buddies to find out who was responsible and then "cut his — off." A threat to castrate, whether taken literally or viewed merely as a figure of speech, has an unmistakably coercive impact and violates Section 8(a)(1) of the Act. See *N.L.R.B.* v. *Moss Planing Mill Co.*, 206 F.2d 557 (4th Cir. 1953).

(c) Russell's statement to Coffero on the eve of the Company's meeting that, if the Teamsters got in, Joe Lee would lock the doors and all of the employees would be out of work is also a clear and emphatic threat which violates Section 8(a)(1) of the Act. Russell's elaboration of the way in which Lee could close the business, either by merger with another company or by closing and later reopening under another name, emphasized his remarks and compounds the gravity of his illegal statements.

(d) The statement of Grill and Russell to Hildebrandt, on the occasion when they offered him a promotion and a substantial wage increase, that the Company did not know who started the Union but the employee responsible would be discovered, discharged, and not rehired is a threat which violated Section 8(a)(1) of the Act.

(e) There is little doubt that the restructuring of the warehouse which was decided on immediately upon the receipt of the Union's demand letter, as well as the proposed wage increases which accompanied this reorganization, were part of an effort by Respondent to head off the unionization of the terminal. Accordingly, when Grill and Russell offered Hildebrandt a promotion and a wage increase on or about April 2, their action constituted a promise of benefit aimed at discouraging union activity and violates Section 8(a)(1) of the Act. *N.L.R.B.* v. *Exchange Parts Company*, 375 U.S. 405 (1964). The same findings apply to the actual grant of wage increases which Respondent made to several returning strikers to induce them to abandon the strike.

(f) Grill's question to Hildebrandt as to whether Hildebrandt had signed a union card constitutes illegal interrogation which violates Section 8(a)(1) of the Act.

(g) Grill's statement to Hildebrandt that he suspected that Danny Florio had started the union drive constitutes the creation of the impression that union activities of employees are the subject of company surveillance and violates Section 8(a)(1) of the Act.

(h) Russell's statement to employees that unionization was useless, that Joe Lee would never stand for the Teamsters, and that he would go to any lengths to stop them amounts to a statement that their union activities were futile and thus violates Section 8(a)(1) of the Act.

His further statement that Lee would close the doors and the employees would be out of a job is a threat which violates Section 8(a)(1) of the Act.

(i) Russell's interrogation of employee Frank Harrington as to who started the union drive is coercive interrogation which violates Section 8(a)(1) of the Act.

(j) Russell's statement to Harrington that, under the new plan for the warehouse, Harrington and others would receive a pay increase is a promise of benefit aimed at discouraging union activity and violates Section 8(a)(1) of the Act.

(k) The credited testimony to the effect that Joe Lee, when speaking, to employees at the Friday meeting, told them that if the Teamsters came in he would close the terminal constitutes a threat which violates Section 8(a)(1) of the Act.

(l) Lee's promise, made on the same occasion, to raise wages of dockworkers and make up for the neglect they had suffered, constitutes an illegal promise of benefit which violates Section 8(a)(1) of the Act.

(m) Grill's statement to Florio on April 7, that Lee would shut down the plant before letting a union come in, is a threat which violates Section 8(a)(1) of the Act.

(n) Grill's statement on April 7, to assembled dockworkers, in which he repeated Lee's statement of the previous Friday that he apologized for his neglect of dockworkers in the past and hoped that the men could sit down and work out a compromise on wage increases, is a promise of benefit which violates Section 8(a)(1) of the Act. His further statement on this occasion that, the way the men were going, everyone would be out of work is a threat which violates Section 8(a)(1) of the Act.

(o) Grill's statement to dockworkers on this occasion that Lee would never accept the Teamsters as the employees' bargaining agent constitutes an unlawful interference with the protected concerted activities of employees and violates Section 8(a)(1) of the Act.

(p) Lee's statement to Coffero and Fontana at the picket line on April 8 that he was sorry about past problems among dockworkers concerning wages, lack of a fixed dinner break, and other aspects of their working conditions and that he would make it up to them constitutes a promise of benefit aimed at inducing them to abandon a strike and violates Section 8(a)(1) of the Act.

(q) Grill's statement to pickets during the strike that, if the Teamsters came into the plant, Joe Lee would close the doors and everyone including himself would be out of a job is a threat which violates Section 8(a)(1) of the Act.

(r) Grill's questions to Hildebrandt on the picket line as to why he signed a card and why the dockworkers were "behaving like this" constitutes unlawful interrogation which violates Section 8(a)(1) of the Act.

(s) Grill's further statements to Hildebrandt on the picket line that the dockworkers, by striking, were merely "screwing" themselves because Lee would close the doors and they would all be out of jobs is a threat which violates Section 8(a)(1) of the Act.

(t) Lee's statement to Harrington at the picket line that, if a union were allowed to come in at Twin County, it would be a union which Lee approved of and that the men should select the "Hoffman Company union," namely, ILA Local 1964, is an interference with Section 7 rights of employees which violates Section 8(a)(1) of the Act.

(u) Lee's statement to Harrington at the picket line on this occasion that, if the Teamsters came in, he would merge the business with Castways and turn the key in the door because Local 478 would never represent the Company is a threat which violates Section 8(a)(1) of the Act.

(v) Lee's statement to Harrington at the picket line on another occasion that Harrington would never work for Lee again constitutes a violation of Section 8(a)(1) of the Act.

B. *The Discharge of Daniel Florio*

Daniel Florio was a dockworker who had signed a union card and who had attended a meeting of dockworkers with Union Business Agent Senick which was held on March 18, at Gepps' Bar. While Florio was by no means the most active union supporter, Grill suspected that he was and voiced this suspicion to Hildebrandt on or about April 1. Grill was also heard to say that he would find out who brought the Union into the terminal and would "cut — off."

Florio was fired on April 7, by Russell, ostensibly because he asked for a day off to take a marine radio operator's examination and instead took 2 days off. When Russell was called to the stand, he did not corroborate Respondent's defense. Instead, Russell testified in a rambling manner concerning another and remote occasion on which Florio had been given time off to take another examination. He gave no support to the Company's position that Florio was entitled to be off only on the Wednesday before his discharge and that he was scheduled to return to work on Thursday. Florio testified credibly that he had asked Russell in advance for time off to take the radio operator's examination and had told Russell that he might need 2 days off, one on which to study for the examination and one on which to go to Philadelphia to take the examination. In fact, Florio took off the Wednesday and Thursday prior to his discharge for this excused purpose. Friday was Good Friday and a holiday at Respondent's terminal. Testimony in the record concerning an occasion on which Florio was found drunk in the parking lot related to an incident which was remote in time from the discharge and had no causal connection with it.

The discharge of a suspected leader in the organizing campaign took place against a background of strong union animus. It was effectuated for a purported reason which was not substantiated by record testimony and for a reason which was clearly pretextual, inasmuch as Florio was given permission to be away the day on which he was assertedly absent without leave. The fact that Florio was reinstated on April 8 in no way affects the original illegality of the discharge. Accordingly, by discharging Daniel Florio on April 7, because of his union membership and his union activity, Respondent herein violated Section 8(a)(1) and (3) of the Act.

C. *The Character of the Original Strike On April 7, 1980*

On Friday, April 4, Senick told Coffero that, if Respondent did not put all the men to work on April 7, he should call a strike. It has already been found that Respondent's plan to cut the size of its work force at the dock and to raise the wages of the remaining dockworkers was directly prompted by the onset of the organizing campaign and by Respondent's desire to prevent the Teamsters from coming into the terminal as the bargaining agent of the employees. Accordingly, a strike to protest the implementation of this discriminatively motivated change in wages and working conditions was an unfair labor practice strike.

It is also clear that the striking employees were greatly concerned with the reasons for the discharge of Brown and Florio. They discussed these discharges with Grill and Russell at the meeting of April 7, and questioned these management representatives as to the reasons these two dockworkers had been terminated. There is little doubt that one of the causative factors which prompted this walkout was the discriminatory discharge of Florio and that one of the necessary conditions for calling off that strike was Florio's reinstatement, a condition which Lee agreed to on April 8. Accordingly, I conclude that Respondent's further unfair labor practice in discharging Florio caused or prolonged the April 7 walkout.

I have also credited corroborated testimony that, on the evening of April 7, Grill came to the picket line, told the pickets that he had spoken with Lee, and informed them that Lee had discharged them. Discharging employees because they have gone on strike violates rights protected by Section 7 and 13 of the Act, and no citation of authority is necessary to establish this proposition. Discharging economic strikers before they are permanently replaced is a violation of the Act. *N.L.R.B.* v. *International Van Lines*, 409 U.S. 48 (1972). When Respondent discharged its striking employees on the evening of April 7, it violated Section 8(a)(1) and (3) of the Act. This unfair labor practice also served to prolong the strike which was in progress and to constitute the striking employees as unfair labor practice strikers, if they were not already such from the inception of the walkout.

D. *The Character of the Strike of April 9, 1980*

There is no factual question that the employees who walked out on April 9 did so because Respondent persisted in implementing its plan for revising the operations of the warehouse. This plan, which called for fewer employees and a substantial increase in the wage rates of the dockworkers who remained, was devised and put into effect as a means of counteracting the Teamsters organizing campaign. As indicated above, this action constituted a violation of Section 8(a)(1) of the Act. Hence, a strike to protest the further implementation of this plan constitutes an unfair labor practice strike.

On the first night of the second strike, Grill visited the picket line and told the picketing employees[13] that they were all fired for going on strike without a legitimate reason. As noted above, discharging employees because they have gone on strike is a patent and flagrant violation of the law and discharging economic strikers prior to replacement is equally illegal. When Respondent took this action on the night of April 9, it again violated Section 8(a)(1) and (3) of the Act and its action served to prolong the strike already in progress. Inasmuch as the 14 unfair labor practice strikers thereby became discriminatees, it was not necessary for them to offer reinstatement in order to be entitled to return to their jobs or to receive backpay. *Abilities & Goodwill, Inc.*, 241 NLRB 27 (1979).

On April 23, at the representation case conference in Newark, the unfair labor practice strikers, through their attorney, offered fully and unconditionally to return to work. The offer was refused. The refusal to reinstate unfair labor practice strikers upon their unconditional offer to return to work is a violation of Section 8(a)(1) and (3) of the Act. *National Tape Corporation*, 187 NLRB 321 (1970); *Abingdon Nursing Center*, 197 NLRB 781 (1972); *ABCO Engineering Corp.*, 201 NLRB 686 (1973). The refusal by Respondent to reinstate the 14 strikers on April 23 is an unfair labor practice. As it occurred within the period established by the Board in *Goodyear Tire and Rubber Company*, 138 NLRB 453 (1962), for considering objections to the conduct of the election,[14] this unfair labor practice also constitutes grounds for setting aside the election which took place on May 8.

E. *The Refusal To Bargain*

1. The majority status of the Teamsters

In *Trading Port, Inc.*, 219 NLRB 298 at 301 (1975), the Board determined that "an employer's obligation under a bargaining order remedy should commence as of the time the employer has embarked on a clear course of unlawful conduct or has engaged in sufficient unfair labor practices to undermine the Union's majority." While this holding does not require that a union's majority status be determined as of the same date that the bargaining order commences, it is logical to predicate a finding of majority status based upon the employee complement which existed as of that date.[15] As found above, Respondent embarked upon its campaign of unfair labor practices on or about April 1. The record herein contains a stipulation that some 40 individuals were employed in the bargaining unit on that date.

[13] This action was directed at all 14 employees named in par. 25 of the first amended complaint.

[14] The representation petition in Case 22-RC-8201 was filed on April 14, 1980.

[15] Par. 16 of the first amended complaint alleges that all full-time and regular part-time truckdrivers, platform workers, and mechanics employed at Respondent's Neptune, New Jersey, terminal, with the usual exceptions, constitutes a unit appropriate for collective bargaining. Respondent states that such a unit could constitute a unit appropriate for collective bargaining but denies that such a unit ever existed. It is clear from the record that the unit did exist, is appropriate for collective bargaining, and was the unit in which Respondent agreed to an election which was conducted on May 8. The facility in question was largely relocated some 4 miles away to a new terminal in Tinton Falls, New Jersey, but this relocation in no way affected the appropriateness of the unit.

I have already found that 22 employees, or a majority of the unit employees, had signed Teamsters designation cards on or before April 1. At the hearing, Respondent leveled individual challenges at only two of these cards, namely, those signed by Walter Hughes and Eugene Bennett.[16] Bennett gave no testimony whatsoever which could impinge upon the validity of the authorization card which he signed on March 18, 1980. In Hughes' testimony, he admitted signing a card on March 28. He testified that Coffero told him on that occasion that everyone was going to join, so he signed the card which Coffero handed to him. Later, when the first strike began, Coffero asked Hughes to go on strike, noting that he had signed a card and asking him if he were going to stick with the other employees. Hughes reportedly protested at that point to Coffero, telling Coffero that he had said that everyone was going to sign when in fact they had not. It was at this point that Hughes told Coffero that he wanted no part of the Union.

Even if Hughes' testimony is credited, it does not depict a misrepresentation of fact by Coffero which prompted Hughes to sign an authorization card. Indeed, Coffero's reported statement to Hughes does not constitute a representation of any current or past fact but was merely an expression of hope for the future of the organizing drive. ("Everyone is going to sign.") As such, it forms no basis for challenging the validity of the card on which Hughes showed an allegiance he was quick enough to pledge until the Union's strike action brought home to him the fact that the Union might call upon him to back up his signature with action. Accordingly, I conclude that since April 1, 1980, the Teamsters was the majority representative of Respondent's employees in a unit appropriate for collective bargaining.

2. The Union's demand for recognition

Since a *Gissel* order is essentially a remedy for a violation of Section 8(a)(1) of the Act, such an order need not be predicated upon subsidiary findings that a union has made a demand for recognition or that an employer has rejected that demand. However, since the General Counsel has alleged that Respondent herein violated Section 8(a)(5) of the Act as well as Section 8(a)(1) and (3), such findings are appropriate in this case and are amply supported by the record. In its letters of both March 28 and April 2, the Teamsters requested recognition. Senick also requested recognition over the phone in talking with Grill and with Foley and in person while talking with Lee on April 8 at an emergency meeting which took place in Lee's office at the terminal. On this latter occasion, Lee negotiated with Senick concerning the return of the striking employees and the reinstatement of Florio and Freddie Brown. As the meeting concluded, Lee agreed to set up a meeting the following week among himself, his attorney, and Senick for the purpose of further negotiating a collective-bargaining agreement. This action constituted a *de facto* recognition accorded to the Teamsters by Respondent as the collective-bargaining representative of its drivers, dockworkers, and mechanics. Later, Respondent withdrew this recognition but without any justification or excuse. (The advent of ILA Local 1964 was in no small part prompted by Respondent's own illegal action and Lee's widely expressed preference for the Union which represented employees at the Hoffman Trucking Company.) Accordingly, I conclude that Respondent herein violated Section 8(a)(1) and (5) of the Act.

3. The appropriateness of a *Gissel* order

In 1969, the Supreme Court declared in *Gissel Packing Co., supra*, that the Board may issue a bargaining order in lieu of directing a representation election in cases where an employer's unfair labor practices are so serious that a fair and free election cannot be held. In the period of time which has elapsed since *Gissel*, this approach to remedying serious unfair labor practices has been repeatedly applied both by the Board and the courts. See, for example, *N.L.R.B.* v. *Broad Street Hospital and Medical Center*, 452 F.2d 302 (3d Cir. 1971); *N.L.R.B.* v. *Easton Packing Company*, 437 F.2d 811 (3d Cir. 1971); *N.L.R.B.* v. *Colonial Knitting Corp.*, 464 F.2d 949 (3d Cir. 1972); *Toltec Metals, Inc.* v. *N.L.R.B.*, 490 F.2d 1122 (3d Cir. 1974); *Frito-Lay Inc.* v. *N.L.R.B.*, 585 F.2d 62 (3d Cir. 1978); *N.L.R.B.* v. *Kenworth Trucks of Philadelphia, Inc.*, 580 F.2d 55 (3d Cir. 1978); *N.L.R.B.* v. *Daybreak Lodge Nursing and Convalescent Home, Inc.*, 585 F.2d 79 (3d Cir. 1978); *N.L.R.B.* v. *Eagle Material Handling, Inc.*, 558 F.2d 160 (3d Cir. 1977); *Electrical Products Division of Midland-Ross Corporation* v. *N.L.R.B.*, 617 F.2d 977 (3d Cir. 1980).

Recently, this doctrine has come under fire in some quarters. In his dissent in *N.L.R.B.* v. *K & K Gourmet Meats, Inc.*, 640 F.2d 460 at 470–471 (3d Cir. 1981), Circuit Judge Gibbons observed:

> It is no secret that at least a significant minority of the members of this court believe that the Supreme Court in *N.L.R.B.* v. *Gissel Packing Co.*, 395 U.S. 575 (1969), 895 S. Ct. 1918, 23 L.Ed. 2d 547 (1969), erred in interpreting the National Labor Relations Act to permit the National Labor Relations Board to enter a bargaining order as a remedy for unfair labor practices committed in the course of an organizing campaign. Nor is it any secret that those judges who are uncomfortable with the *Gissel* construction of the statute have been signalling the Board vigorously that bargaining orders are unwelcome in this circuit. . . . At the same time the Board is receiving from a different group of judges on this court quite a different signal. . . . These different signals are that we acknowledge the primacy of the Supreme Court in interpreting the Act, at least until Congress speaks, that we acknowledge the primacy of the Board as fact finder, and that if the Board decides to enter a *Gissel* order we will be satisfied with a statement of reasons reasonably identifying for us the basis, among several permissible bases, for choosing that remedy.

[16] Respondent introduced evidence of misrepresentation relating to assertions made to certain employees who were not card signers but such statements, even if made, could have no possible bearing on the Union's majority status or on the cards which establish that status.

> Until this case, the guerilla warfare against *Gissel* orders has been carried out by insisting that the Board's opinion writing is so opaque that we cannot understand it and remanding. . . . With the present majority a new weapon is resorted to. The majority simply substitutes its fact finding for that of the Board. Perhaps the new tactic reflects a conclusion that finally the Board has devised a formula for stating its reasons satisfactorily. . . .

While a court may be empowered to ignore Board precedent and Board findings or give an "ungenerous reading"[17] to its own precedents, it may not properly ignore what the Supreme Court has done. Accordingly, I set forth the basis upon which the Supreme Court concluded, in *Gissel*, that a bargaining order was warranted in that case because a fair and free election could not be held therein. A comparison of the facts in *Gissel* with the facts in this case amply demonstrates that a *Gissel* order should be ordered herein. *Gissel* involved a series of unfair labor practices committed in a bargaining unit of 47 members during the course of an organizing campaign. Those violations included the discriminatory discharge of two employees, an announcement by the company vice president that union meetings would be placed under surveillance and that reports to the company would be made, concerning the presence of a member of the owner's family in the vicinity of a union meeting, several instances of coercive interrogation, a statement by the company vice president to an individual employee that "I can give you more than they [the Union] can," and another statement by the same individual that he did not want to hear more about "this union stuff." The basis upon which I have concluded that a free and fair election could not be run in this case because of the repeated anf flagrant unfair labor practices of this Respondent is set forth above in sections C, 1, 2, 3, and 4 of this Decision, and I reiterate the conduct found therein in support of a recommendation for *Gissel* order as fully as if I repeated it *in haec verba* at this point in the Decision. I stress also that the illegal discharge of 14 out of 40 members of a bargaining unit, as found in this case, cannot by any stretch of the imagination be regarded as isolated conduct having no bearing on the expression of employee sentiment at the ballot box.

4. The offering and granting of wage increases to bargaining unit employees

In the amended complaint the General Counsel has alleged that the Respondent violated Section 8(a)(1) and (5) of the Act by offering and then granting wage increases to bargaining unit employees without negotiating those increases with their bargaining agent. According to the Board doctrine enunciated in *Trading Port, supra*, an 8(a)(5) violation can be predicated upon such conduct if it occurs at or after the point in time when an erring employer has embarked upon a clear course of unlawful conduct or has engaged in sufficient unfair labor practices to undermine the Union's majority status. Such conduct on the part of this Respondent began on or about April 1, 1980, so any unilateral changes in wages or working conditions which were implemented on or after this date without negotiation with the employee bargaining agent amounts to an unlawful refusal to bargain within the meaning of Section 8(a)(5) of the Act.

Prior to the Good Friday meeting which Respondent held with some of its work force, several members of the platform crew, including Hildebrandt and Harrington, were told by company supervisors that their wage rate would be substantially increased and that the size of the dock crew would be substantially reduced. This same message was given to all dockworkers by Grill and Russell on Monday evening, April 7. Most of the dockworkers went on strike on April 9, and some drifted back to Respondent's payroll as the strike wore on. Several returning strikers testified at the hearing that, upon their return or shortly thereafter, they began to be paid at rates considerably in excess of what they had been receiving when they walked out. At the emergency meeting between Lee and Senick which was held on the morning of April 8, agreement was reached to hold another meeting the following week for the purpose of negotiating a contract covering the unit here in question. That meeting was called off. At no time did Respondent negotiate any changes in the wages or manning requirements for its dockworkers with the Teamsters nor, with the exception of an agreement to set up an aborted negotiating session, did it even offer to do so. Both wages and manning requirements are mandatory subjects of bargaining. Accordingly, I conclude that, when Respondent unilaterally implemented the above-recited changes without bargaining, it violated Section 8(a)(1) and (5) of the Act.

Upon the foregoing findings of fact, and upon the entire record herein considered as a whole, I make the following:

CONCLUSIONS OF LAW

1. Respondent Twin County Trucking, Inc., is now and at all times material herein has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Both Local 478, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and Local 1964, International Longshoreman's Association, AFL-CIO, are, respectively, labor organizations within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time truck drivers, platform workers, and mechanics employed at the Respondent's Neptune and Tinton Falls, New Jersey, facility, but excluding all office clerical employees, managerial employees, professional employees, guards, and supervisors as defined in the Act, constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act.

4. Since on or about April 1, 1980, Local 478, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, has been the exclusive collective-bargaining representative of all of the employees in the unit found appropriate in Conclusion of Law 3

[17] The phrase belongs to Chief Judge Seitz, dissenting in *N.L.R.B.* v. *Permanent Label Corporation*, 657 F.2d 512 (3d Cir. 1981).

for purposes of collective bargaining, within the meaning of Section 9(a) of the Act.

5. By refusing to recognize and bargain collectively with, and by withdrawing recognition from, Local 478, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, as the exclusive collective-bargaining representative of its employees in the bargaining unit found appropriate in Conclusion of Law 3 herein; and by unilaterally granting wage increases and making changes in the complement of platform crews without first bargaining in good faith with said Union concerning said changes, Respondent herein violated Section 8(a)(5) of the Act.

6. By discharging Daniel Florio on April 7, 1980; by discharging the employees who went on strike on April 7, 1980; and by discharging Darren Brown, Anthony Coffero, Steven Cole, Daniel Florio, Joseph Fontana, Frank Harrington, Thomas Henville, John Hewlitt, Joseph Hildebrandt, Stafford Hoffman, James La Pointe, Ray La Pointe, and Bryan O'Connor because they engaged in a strike or because of their membership in and sympathy with Local 478, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, Respondent has violated Section 8(a)(3) of the Act.

7. By refusing on April 23, 1980, to reinstate 14 unfair labor practice strikers upon their unconditional request to return to work, Respondent herein violated Section 8(a)(1) and (3) of the Act. Such action also constitutes objectionable conduct warranting the setting aside of an election which was conducted on May 8, 1980, in Case 22-RC-8201.

8. By the acts and conduct set forth above in Conclusions of Law 5, 6, and 7; by threatening to discharge employees, lock the doors, or merge the Company with another company if the Union came in; by threatening to castrate employees because of their union activities; by offering employees promotions, wage increases, and other unnamed benefits in order to defeat the unionization of the Company; by coercively interrogating employees concerning their union activities and the union activities of other employees; by telling employees that their union activities were acts of futility; by urging employees to select as their bargaining agent a labor organization other than the one they had selected and telling them that the only union which the Company would recognize would be one which met company approval; and by telling striking employees that they would never be hired again, Respondent herein violated Section 8(a)(1) of the Act.

9. The strikes which occurred at Respondent's terminal on April 7 and 9, 1980, respectively, were both caused and prolonged by Respondent's unfair labor practices.

10. The aforesaid unfair labor practices have a close, intimate, and adverse effect on the free flow of commerce within the meaning of Section 2(2), (6), and (7) of the Act.

THE REMEDY

Having found that Respondent herein has engaged in certain unfair labor practices, I will recommend that it be required to cease and desist therefrom and to take certain affirmative actions which are designed to effectuate the purposes and policies of the Act. Since the independent violations of Section 8(a)(1) of the Act found herein are repeated and pervasive, I will recommend to the Board a so-called broad 8(a)(1) remedy designed to suppress any and all violations of that section of the Act. *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979). As discussed more fully above, the recommended Order will provide for a *Gissel* remedy and will provide that Respondent be required to offer full and immediate reinstatement to all of the disciminatees named in paragraph 25 of the first amended complaint and to make them whole for any loss of earnings which they may have sustained by reason of the discrimination practiced against them, in accordance with the *Woolworth* formula,[18] with interest thereon at the adjusted prime rate used by the Internal Revenue Service for the computation of tax payments. *Olympic Medical Corporation*, 250 NLRB 146 (1980); *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). I will also recommend that Respondent be required to post the usual notice, advising its employees of their rights and of the results in this case.

[Recommended Order omitted from publication.]

[18] *F. W. Woolworth Company*, 90 NLRB 289 (1950).